

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

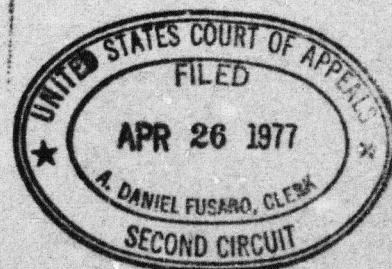
76-4220

APPENDIX FOR BARTON MANUFACTURING CORR.

Respondent's Appendix

B

Pls



"Exhibit A"

Emanuel & Emanuel
ATTORNEYS AT LAW

JAY EMANUEL
JON EMANUEL

170 BROADWAY
NEW YORK, NEW YORK 10038
212-349-2166

July 28, 1976

2488 GRAND CONCOURSE
BRONX, NEW YORK 10458
212-295-0407-08

Mr. Levy
National Labor Relations Board
Region 29
16 Court Street
Brooklyn, New York 11241

RE: Barton Manufacturing Corp.
Case No. 29-CA-3912

Dear Mr. Levy:

In response to your request for documentation of certain allegations made about Earl Thrane, please be advised that I am hereby affirming under penalties of perjury, and by virtue of my being an officer of the court in the state of New York, the following as true based upon my own personal researches.

To recapitulate the issues involved in this case, it will be recalled that it was Thrane's contention that he had been terminated because of his union activities. As proof supporting this contention Thrane produced certain union officials who had hitherto unsuccessfully attempted to come into my client's plant and the testimony of Thrane himself. I would like it known for the record at this point that the union officials had, during the hearing contacted me and suggested that if we would allow them to come into the plant they would immediately prevail upon Thrane to cease further prosecution of his complaint. Needless to say, I did not accept their suggestion nor did my client.

In order to sustain their allegations the proof adduced at the hearing were statements made by the union officials and by Thrane himself. Credibility, to wit, the truthfulness of the statements made by Thrane and his witnesses were obviously essential in the determination of the hearing examiner.

It was my client's contention that Mr. Thrane was not fired because of his purported union activities, but because of a consistent pattern of poor behavior, failure to respond to instructions properly, and problems with respect to his driving and work performance in the plant, and ultimately, his refusal to go out on a job when so instructed by a supervisor.

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Mr. Levy - NLRB

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After sifting the evidence and hearing the testimony, the hearing examiner concluded that Thrane's testimony was more credible than my client's. The following will clearly reveal not only the error in this decision, but an unequivocal vindication of my client, who has sustained considerable costs and expense because of the naivete and the intractability and officiousness of the Labor Board.

Before detailing the results of my researches I would like to put the Labor Board on notice that after confirmation by independent investigation of the facts which I will hereinafter detail, I expect an immediate cessation of the Labor Board's harassment and a final resolution dismissing the case. Should we fail to receive same, please be aware that we will immediately proceed by show cause order, to enjoin any further proceedings and sue the Labor Board and appropriate personnel for abuse of administrative process and prima facie tort.

Earl Thrane is presently being sought by the police, specifically Detective Kennedy, for the latest in a long series of felonies that he has committed. Without Barton Container's permission, or consent, Earl Thrane unlawfully obtained ten checks of the Barton Manufacturing Corporation, which has an account in the Long Island Trust Company, Freeport, Long Island, bearing number 05-52559-2. Thrane and his associate proceeded to forge the names of Barton officers and passed those forged checks, inter alia, at Pathmark Stores, whom we are advised are pressing charges.

I have been advised by my client that the amount of forged checks exceeds \$3,000, and that the Long Island Trust Company which had to make good the money is also pursuing criminal charges against Thrane.

I will, under separate cover, be supplying you with photocopies of the forged checks, and I would suggest that your investigators contact Long Island Trust Company in Freeport to get the specifics as to Mr. Thrane's conduct.

Mr. Thrane has had an extensive and diverse criminal career. He is widely known in Nassau County in the criminal courts, and to the probation department. I have researched only the most recent criminal activities of Mr. Thrane, however I am advised by the Clerks that his rap sheet reads like a telephone directory.

Under Docket No. 489 of 1975, Earl Thrane was charged with violating Section 2505 of the Penal Law, and on March 18, 1975 the disposition of the matter was superseded by prosecutor's information.

Under Docket No. CR556, Earl Thrane was charged with violating 145.50 subdivision 2 of the Penal Law, and on September 22, 1975 that was also superseded by a prosecutor's information.

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Under Docket No. CR558 Earl Thrane was charged with violating Section 19505, 240.30 (1) and 240.50 (3). In January, after a trial he was found not guilty on the first two counts and guilty on the third, to wit, falsely reporting an incident, and on February 26, 1976 he was sentenced to 88 days in prison to run concurrent with another charge in which he was found guilty to wit, 2682A of 1975.

I should add, parenthetically, at this point, Mr. Levy, that one of the reasons why Mr. Thrane apparently was not in communication with your office during the months of March, April and May, was because he was cooling his heels in the Nassau County Jail pursuant to the above sentence. Additionally, in 1975 Mr. Thrane was charged with violating Section 511 of the VTL, driving with suspended license.

I should also add at this point, that indeed our prior testimony had alluded to the fact that we had believed this to be the case, and your transcript will reveal Thrane's righteous and emphatic denials. In actual fact, on August 26, 1975, Thrane pled guilty to an amended charge, Section 1180A of the VTL. He was fined \$50.00, but failed to pay that amount and as a consequence a bench warrant was issued which resulted in his arrest, whereby he spent 5 days in jail.

Thrane is now currently under indictment and facing a trial before Judge Vitali in the Nassau County courts on September 7, under the following indictment numbers 43795 and 39359. Under indictment number 39359 he is charged in a first count with violating section 240.25 subdivision 5, with acting in concert with intent to annoy and harass and alarm another person. Under the second count, he is charged with violating Section 240.30 subdivision 1, by, inter alia, sending a cardiac rescue squad false fire alarm, causing police and firemen to appear at complainant's home and throwing a burning bicycle seat at the front door. It is further alleged in the complaint sheet that he made harassing and obscene phone calls in which he said, "Ha, ha -- Got you again you mother-fucker."

Under the third count Thrane is charged with violating Section 135.5 in that he tampered with the property of the New York Telephone Company, and under the fourth count he is charged with theft of services. The last count and the most serious alleges the commission of a class B felony, to wit, robbery first degree in that on February 14, 1974, Thrane and an accomplice held up the Hi-Lo Bar at 3318 Merrick Road, with what appeared to be a pistol.

After several appearances Thrane did not appear in the district court on November 20, 1975, and Judge Chimmon issued a bench warrant for his arrest. On July 15, 1976, robbery first degree was reduced to robbery second degree. Presumably as a result of some plea bargaining. On May 22, 1975 Judge Baker ordered that Thrane be examined by a duly qualified psychiatrist.

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Thrane's defense counsel had contended in a motion that Thrane was not able to comprehend the nature of the Miranda warnings given him, and that therefore certain admissions were improper.

In response Judge Edward Baker stated in his decision on December 3, 1975, "the major thrust of the defense as indicated by the voluminous psychiatric testimony on this record is the assertion that the defendant's limited mental capabilities precluded him from being able to understand his constitutional rights. While the court is constrained to agree that the defendant taken at his best is dull, it is equally clear that he is not so impaired as not to be able to understand his rights . . . there is ample evidence that while defendant's intelligence is borderline he is capable of functioning normally in society."

Perhaps more revealing than the Judge's observations is the affidavit of Thrane's defense counsel George Nager, an attorney of a respected Long Island law firm who from his affidavit professes to have a long and intimate knowledge of Thrane's history. Nager states in his affidavit, "at a very early age he (Thrane) exhibited emotional problems which required his attending a special school in Syosset...that he received anything of real measure from the educational system is open to serious question . . . what he desperately needed he was unable to get. That was a one to one supervised training at a very critical point by a parental figure. His record is extensive and exhaustive in the Family Court. . . all efforts of the Family Court came to naught. Thereafter, of course, there was a series of misadventures . . . since Earl Thrane left school without any skills he of course had a problem in the labor market...his personal problems however have given him difficulty...he has worked as a truck driver in various jobs for several employers. Admittedly he has had difficulties with employers, but basically the problem is that he has very little skills, and still has a need to relate."

This affidavit was dated April 6, 1974, and was signed by George Nager, the attorney for Thrane.

Finally, on September 7, Thrane is set for trial under indictment 43795 for grand larceny in the third degree. In this indictment it is alleged that Thrane on or about the 30th of October, 1975 stole from a Jose Cots certain property over \$250.00. A bench warrant for his arrest under this indictment was issued on December 12, 1975. From what I understand, from the court officials, and the police department, Thrane has had a long history of trouble with the law, that predates the items above listed.

Mr. Levy _ NLRB

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Now, while it is axiomatic that bad men still make good law, to wit, the Miranda case, the fact remains that at issue in our dispute is the credibility, conduct and behavior of Thrane. My client's you will recall had asserted and testified that Thrane's behavior was erratic, that he was having difficulty relating and that on several occasions he had caused certain problems with respect to the vehicle that he was driving.

It is clear from the foregoing that Mr. Thrane successfully hoodwinked the hearing officer and the labor board, and that any further prosecution and harassment of my client takes on, under the circumstances, Kafkaesque dimensions. Whether Mr. Thrane is successfully able to stay out of jail after September 7th is of course open to question. What is clear however, at this time, is that my client can be under no legal compunction to rehire an individual who has perpetrated a felony upon them. I would, accordingly, request that your investigators make an immediate inspection of the court records at the District and County courts in Nassau as well as contacting the Long Island Trust Company Bank, and the police department.

I am awaiting your prompt response and trust that this matter be brought to a speedy end without my client having to take legal action against the labor board and certain agents with respect to the farce perpetrated upon them.

Very truly yours,

JON EMANUEL

JE:kb

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"Exhibit C"

80 EXCHANGE PLACE AT BROADWAY, NEW YORK

To all to whom these Presents shall come or may Concern,

Greeting: KNOW YE, That EARL THRANE

for and in consideration of the sum of Seven hundred fifty and 00/100-----
----- Dollars (\$ 750.00)
lawful money of the United States of America to him in hand paid by

BARTON CONTAINER CORP. and BARTON MANUFACTURING CORP.,

the receipt whereof is hereby acknowledged, have remised, released, and forever discharged and by
these presents do for his
heirs, executors, and administrators and assigns, remise, release and forever discharge the said
BARTON CONTAINER CORP. and BARTON MANUFACTURING CORP.,

heirs, executors, administrators, successors and assigns of and from all manner of actions, causes of
action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, con-
tracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions,
claims and demands whatsoever, in law, in admiralty, or in equity, which against he

ever had, now has or which his heirs, executors,
or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing
whatsoever from the beginning of the world to the day of the date of these presents.

This release may not be changed orally.

In Witness Whereof, I
the 2nd day of July
Sealed and delivered in the presence of

have hereunto set my hand and seal

19 75

Earl Thrane L.S.
EARL THRANE

"Exhibit D"

Re: Barton Manufacturing Corp.
Case No. 29-CA-3912

1975 - 4th Quarter

Gross Backpay:	4 weeks at \$139 per week 9 weeks at \$143 per week	\$1843
Interim Earnings:	Daryl Dress Co. 1307 Washington St. Louis, Missouri 63103	\$ 161
Net Backpay:		<u>\$1682</u>

1976 - 1st Quarter

Gross Backpay:	8 weeks [Out of labor market - 5 weeks]	\$1144
Interim Earnings:		0
Net Backpay:		<u>\$1144</u>

1976 - 2nd Quarter

Gross Backpay:	11 weeks, 3 days [Out of labor market - 7 days]	\$1659
Interim Earnings:		0
Net Backpay:		<u>\$1659</u>

1976 - 3rd Quarter

Gross Backpay:	4 weeks	\$ 572
Interim Earnings:		0
Net Backpay:		<u>\$ 572</u>

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Exhibit E "

BARTON MANUFACTURING CORP.

33 FRONT STREET • EAST ROCKAWAY, N. Y. 11518 • (516) 872-3516 • (212) 657-8454

June 3, 1975

As of 12:45 P.M. on June 3, 1975, I, Earl Thrane, am not ready to assume my duties at Barton Mfg. Corp., 83 Bennington Ave., Freeport, N.Y.

L.S.

Earl Thrane

"Exhibit F"

RALPH G. CASO
COUNTY EXECUTIVE



LOUIS J. MILONE
DIRECTOR OF PROBATION

ROBERT J. BENNETT
CHIEF DEPUTY DIRECTOR

JAMES J. TREUCHTLINGER
DEPUTY DIRECTOR - ADULT DIVISION
516 335-3457

PROBATION DEPARTMENT
NASSAU COUNTY COURT BUILDING

262 OLD COUNTRY ROAD

P.O. BOX 189

MINEOLA, NEW YORK 11501

516 335-3457

March 10, 1977

Personnel Department
Barton Containers
83 Bennington Avenue
Freeport, New York

Re: Earl Thrane

Date of Birth: 6/10/54

Social Security No.: 128-44-6912

Gentlemen:

The above named defendant is now awaiting disposition before the Youth Part - County/District Court of this county.

Information has been submitted to us that he/~~she~~ was employed by your concern from 1974 to 1975 in the capacity of truck driver ; that his/~~her~~ remuneration was \$140/week.

May we request you to examine your files and submit to us the following:

1. Exact period of employment
2. Title or position
3. Remuneration
4. Dependability and reliability
5. Rapport with management, supervisors and co-workers
6. Reason for termination
7. Eligibility for re-hire

and any other information which you feel will assist in the evaluation of his/~~her~~ case. Please be assured that all data communicated will be held in strictest confidence.

Thank you for your cooperation.

Very truly yours,

Louis J. Milone
Director of Probation

Probation Officer
Walter E. Anderson

¹¹ Exhib. + C¹¹

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT		BARTON MANUFACTURING CORP. 83 BENNINGTON AVENUE FREEPORT, N. Y. 11520		4091
DATE	AMOUNT	PAY TO THE ORDER OF	<i>Carl Lane</i>	19 <i>62</i> 50-1063 214
			<i>Five</i>	\$ <i>750</i>
			0000	DOLLARS
			BARTON MANUFACTURING CORP.	
		Long Island Trust Company FREEPORT, N. Y.	<i>Harold</i>	AUTH. SIG.
IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY		⑆0214⑆1063⑆⑆05⑆32559⑆2⑆⑆0000075000⑆		

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